

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

MATTHEW CHAMLIN, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON and McNEIL  
NUTRITIONALS, LLC,

Defendant.

Case No. 1:19-cv-03852-AJN

**DEFENDANTS JOHNSON & JOHNSON AND McNEIL NUTRITIONALS, LLC'S  
NOTICE OF SUPPLEMENTAL AUTHORITY**

Dated: May 11, 2020

**O'MELVENY & MYERS LLP**

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*Counsel for Defendants Johnson & Johnson and  
McNeil Nutritionals, LLC*

Defendants Johnson & Johnson and McNeil Nutritionals, LLC, respectfully submit this Notice of Supplemental Authority to call the Court's attention to a recent decision that is relevant to Defendants' pending Motion to Dismiss: *Badzio v. Americare Certified Special Services, Inc.*, 177 A.D.3d 838 (N.Y. App. Div. 2019). A copy is attached as **Attachment A**. In their reply brief, Defendants noted that they were "not aware of a single New York state court decision that has considered the implications of *China Agritech* on class action tolling under New York law." Reply at 2 n.2. The *Badzio* decision was issued shortly before Defendants filed their reply but did not come to Defendants' attention until recently. Counsel for Defendants regret this oversight.

The *Badzio* decision is relevant to Defendants' argument that New York courts would follow *China Agritech* to bar tolling of class action claims. In *Badzio*, the New York Supreme Court, Appellate Division, confirmed that New York courts follow *American Pipe* and *China Agritech* in determining class action tolling under New York state law. 177 A.D.3d at 841–42. The court in *Badzio* distinguished the facts before it from those in *China Agritech*, and applied *American Pipe* tolling to class claims in a situation where no court had yet made a "determination that class action status was inappropriate" and the equities weighed in favor of tolling. 177 A.D.3d at 842. The *Badzio* court made clear, however, that "*China Agritech* ... stands for the proposition that *American Pipe* tolling does not save a subsequently filed class action when class certification previously has been denied." *Id.* Here, this Court previously denied class certification in a substantially identical case and did not grant the plaintiff's request to substitute a new class representative. See *Bowling v. Johnson & Johnson*, 2019 WL 1760162, at \*1 (S.D.N.Y. Apr. 22, 2019) (Nathan, J.). And for the reasons explained in Defendants' Motion to Dismiss, this is not a situation where tolling "is consistent with the policies underlying the tolling doctrine: avoiding

multiplicity of suits and vexatious litigation.” *Badzio*, 177 A.D.3d at 842; *see* Mot. at 11–12, 15–17; Reply at 9–10.

Thus, although the *Badzio* decision applied class action tolling under legally and equitably distinguishable facts, that decision supports Defendants’ contention that New York courts would apply *China Agritech* to bar the class claims here. Defendants respectfully request that the Court consider this decision in deciding Defendants’ Motion.

Date: May 11, 2020  
New York, New York

Respectfully submitted,

/s/ Hannah Y. Chanoine

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